IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

Exh._____

ELECTION PETITION No 11 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE A.K.TRIVEDI

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SURENDRASINH NETRAPRATAPSINH RAJPUT

Versus

BHARAT CHIMANLAL BAROT (DANDAK

Appearance:

Mr. N.S. Dixit with Sr. Advocate Mr. M.R. Barot for the petitioner.

M/s.HL PATEL ADVOCATES and Advocate Mr. V.D.Gajjar with Sr. Advocate S.K. Zaveri for the respondent.

CORAM : MR.JUSTICE A.K.TRIVEDI

Date of decision: 20/01/2001

ORAL JUDGEMENT

Heard Advocate Mr. N.S. Dixit with Senior Advocate Mr. M.R. Barot for the petitioner and Advocate

Mr. V.D. Gajjar with Sr. Advocate Mr. S.K. Zaveri for the respondent.

1. The petitioner has called in question the election of Gujarat State Legislative Assembly held on 28-2-1998 in respect to 69, Dariapur Kazipur Constituency and has prayed to declare the election of the respondent as void and has further prayed to declare the respondent disqualified for contesting the election for the period of six years on the ground that the respondent has committed corrupt practice as defined under Sec.123 of the Representation of People Act,1951 (for short "Act").

The petitioner has averred and contended that the petitioner is a voter of 72, Asarva Legislative Assembly Constituency of Gujarat State and the name of the petitioner appears at Serial no.1100 of the electoral roll in the Part no.162/194 of Asarva Ward, 72, Asarva Legislative Assembly, Gujarat. The petitioner was one of the contesting candidate alongwith other ten candidates who contested the said election from the said constituency wherein the respondent secured 32,407 votes out of 63,113 valid votes declared to have been tendered while the petitioner could get 24,117 votes, and as such, the Returning Officer has declared the respondent as a returned candidate from the said constituency on 2nd March, 1998.

2. The petitioner has challenged the validity of the election of respondent as a returning candidate on numerous grounds.

It is contended that during the course of counting of votes glaring discrepancies in respect to ballots tendered in the ballot boxes and recovered therefrom have been noticed. That the Returning Officer having failed to notice the discrepancies, recounting of the votes has become necessary. The petitioner has enumerated in paragraph 6 to 19 the serial numbers of ballot papers provided to the Presiding Officers of the different polling booths as stated in relevant form no.16 and has also stated that the form no.16 issued by the Returning Officer of said booths disclose discrepancy in number of ballots issued, signed, utilized and unutilized as well as total number of ballots that remained with the Returning Officer. That the different columns of form no.16 in respect to different booths as stated in paragraph 6 to 19 of the petition suggests series of infirmity in the process of counting as prescribed under the Conduct of Election Rules, 1961 ("Rules" for short), and as such, the process of election of the said

constituency has been vitiated on account of improper reception, refusal or rejection of vote or the reception of any vote which is void.

The petitioner has also contended that the Presiding Officers of the booths established for polling in respect to subject election did not provide true copies of form no.16 to all the polling agents of the petitioner, and as such, the petitioner could not aver the particulars of the discrepancies in respect to polling of votes and recovery of ballot papers from the ballot boxes of the various other booths. However, it is contended that on account of acceptance of said improper votes and counting of the same has materially affected the result of the election in favour of the respondent, and therefore, recounting of votes is necessary.

(3) The petitioner has also challenged the validity of the election of the respondent in respect to said constituency on the grounds that the respondent has committed corrupt practice within the meaning of Sec.123(7) of Representation of Peoples Act, 1951 ("Act" for short) inasmuch as the respondent has obtained or procured the assistance for the furtherance of his election process from a person in the service of the Government and belonging to the members of the police force.

Enumerating the details about the aforesaid corrupt practice, it is averred in paragraph 21(A) of the petition that:

(a) One Atul alias Chikoo Barot is a brother of the respondent who was serving as a Police Sub Inspector in the CID Branch of the DG Office at Meghaninagar, Ahmedabad at the relevant time of the election. The said Shri Atul alias Chikoo was actively supporting the candidature of the respondent and during the election he was actively canvassing in favour of the respondent at many places in the constituency. That on 20-2-1998 which was a polling day one Bhavesh Ramanlal Patel was proceeding to Circuit House to cast his vote alongwith one Shri Pratap Shakaraji Thakore at about 10.45 a.m. and said Atul alias Chikoo Barot assaulted them on the road opposite to the Circuit House. As such, the brother of the respondent said Atul alias Chikoo Barot prevented said Bhavesh Ramanlal Patel from exercising his franchise.

(b) The petitioner has also contended that on the same day at about the same time one Pratapji Shakaraji

Thakore the worker of the Congress Party to which the petitioner belongs, was moving in the area of Dariapur Kazipur Legislative Assembly with his friends Ishwarbhai Vaghjibhai Desai. That when they reached near the Circuit House one Atul Babaji Thakore residing at Dafnala, Shahibaug and Kanji Bharwad also resident of the said area met Shri Pratapji Shakaraji Thakore with the brother of the respondent said Atul alias Chikoo alongwith one Mr. Jayesh Chimanlal Shah and Bhavesh alias Bavo also residents of the said area and one Sharad Sahdevbhai Thakore also resident of the said area came there in the company of 10 to 15 other persons and caused assault on said Bhavesh Ramanlal Patel residing at Vrandavan Society, Ghevar Complex, who was proceeding to cast his vote. That said Atul alias Chikoo Barot assaulted Bhavesh by saying that why he had come there. At that time said Pratapji Shakaraji Thakore and his friend Ishwarbhai Desai who were present there intervened and tried to pacify the brother of the respondent said Atul alias Chikoo Barot. That at that time, Atul alias Chikoo Barot and his friend Bhavesh Modi, Sharad Thaker and Jayesh Shah caused an assault on said Pratapji Thakore and Ishwar Desai. That one Dr. Harshad Patel also reached there at that time and caught hold of one of the persons accompanying said Pratapji Thakore while other persons who came there with Atul alias Chikoo Barot gave kick and fist blows to the said person. That Atul alias Chikoo Barot had a stick in his hand and he assaulted said Ishwarbhai with the stick. That Sharad Thaker assaulted Pratapji Thakore and his friends by throwing chilly powder from his pocket. In the meanwhile, one Ranchhodbahi Masharubhai Bharvad came there and intervened. That during that period as police van was approaching, assaulting party ran away and only one Thaker was arrested.

(c) It is contended by the petitioner that brother of the respondent caused assault on the friends of the petitioner said Pratapji Sakaraji Thakore and Ishwarbhai Desai with the consent of respondent and his election agent Pravin Patel who was also present at the place of assault. The petitioner has further contended that election agent of the respondent said Pravin Patel was instructing brother of the respondent to prevent the voters who were supporters of the petitioner from exercising their franchise. That the said act and action on the part of the brother of the respondent and his election agent Pravin Patel amount to committing corrupt practice within the meaning of Sec.123(7)(d) of the Act.

4. The petitioner has further challenged the

validity of subject election on the ground that respondent has committed corrupt practice by appealing to the electors on the basis of religion. That the respondent had undertaken extensive campaign in the area of the said constituency and had contacted electors at their house on February 22, 1998. That during the said campaign the respondent was holding door to door meeting and had appealed to the voters to vote in his favour on religious grounds. It is averred by the petitioner that the respondent appealed to the voters to the effect that the respondent would like to contribute to the national and State politics to establish the Indian Society as a Hindu religion State, and thereby made perverse appeal to the voters on the ground of Hindu religion and offered calendars for the year 1998 printed by one Rajkalp Mudranalay Pvt.Ltd. having its telephone number 070-5622299 and showing the picture of Lord Hanuman with a view to appeal to the voters to vote in his favour so as to establish Hindu State. That the respondent was showing picture of Lord Hanuman to the voters and appealed to the effect that Lord Hanuman was loyal to God Ram and Goddess Seeta and in the same manner the candidates of Bharatiya Janta Party to which the respondent belonged would be loyal to the public. The petitioner has contended that the calendars offered by the respondent to the resident voters of the said area also contained a symbol of Bharatiya Janta Party and a slogan stated in Gujarati "Sauni Atal Kamna Ram Rajyani Sthapana". It is alleged by the petitioner that the respondent personally made the request to the voters that all Hindus should unite as during in earlier rule of Indian National Congress minority was pampered and that it was the right time whereby Hindus should protect their religion and establish Hindu State.

Stating particulars about the corrupt practice, the petitioner has averred in paragraphs 25, 26, 27 and 29 that the petitioner has visited the house of various persons stated therein and had offered calendar as described hereinabove and appealed to the voters to vote in his favour.

On the said particulars the petitioner has contended that the respondent is guilty of corrupt practices within the meaning of Sec.123(3) of the Act, and thereby, election of the respondent is liable to be declared as void under Sec.100 of the Act.

The petitioner has presented the petition on 16-4-1998 alongwith list of documents of 24 accompaniments. That on 29-6-1998 summons was issued to

the respondent after preliminary scrutiny. That the respondent appeared through Advocate M/s. H.L. Patel Advocates on 29-7-1998 and filed written statement vide Exh.10 to resist the petition.

5. That the respondent has denied and controverted the averments and allegations made by the petitioner in the petition and has contended that the petition is liable to be dismissed as it is not in accordance with the provisions Sec. 81, 82 and 83 of the Act. It is further contended that the petition fails to disclose cause of action, and thereby also, deserves to be dismissed. The respondent has contended that the petition does not disclose any ground contemplated under Sec.100 and 101 of the Act read with Sec.83 so as to claim the relief as prayed in the petition, and thereby also, the petition is not maintainable. It is also contended that before filing the petition, at no point of time, the petitioner hadmade any complain to any concerned authority regarding alleged corrupt practice as averred in the petition; nor has he filed any complaint before the Police Authority, and as such, the petitioner has come out with the said allegation for the first time in the petition without any supporting evidence, and thereby, cannot inspire any confidence. It is also contended that no complaint has been filed by the petitioner at the time of counting of votes before any authority or Election Commissioner regarding alleged discrepancy. Furthermore, the respondent has controverted the facts emerging from Annexures appended to the petition and contended that facts alleged by the petitioner did not constitute corrupt practice within the meaning of Sec.123 of the Act. That no authentic evidence to support the said allegation is produced, and as such, the petition deserves to be rejected.

That in paragraph 25, the respondent has averred with regard to the adverse background of the petitioner and alleged that in the year 1990 during the time of polling and counting of votes, the petitioner had created terror and at that time the present respondent was also a candidate of the Bharatiya Janta Party and had to file a criminal complaint against the petitioner. That the complaints were made to the Election Commissioner and other authorities by the respondent in anticipation of prejudicial activity of the petitioner during the election of 1998 and telephonic complaints were also made to control room. The respondent has urged to dismiss the petition with costs.

6. From the pleadings, issues were raised vide

Exh.22 on 12th February, 1999 as under:

1. Is it proved that the petition as filed in the present form is not maintainable at law as alleged by the respondent in paragraph 2(a), (b) and (c) of the written statement Exh.10?

2. Whether the petitioner proves that the result of the election in question has been materially affected on account of improper acceptance and/or rejection of votes during the counting process as alleged in the petition?

3. Whether the petitioner proves that the respondent had obtained or procured the assistance of persons in service of the Government and/or belonging to the member of the police force as alleged in paragraph 21 of the petition.?

4. Whether the petitioner proves that one Bhavesh Ramanlal Patel and Pratapji Shankerji Thakore alongwith their associates were prevented from exercising their respective franchise at the election in question on account of assault alleged to have been caused on them by the brother of the respondent as alleged in the petition. If yes, is it proved that on account of said act and action on the part of the respondent, the result of the election has been affected as alleged.?

5. Whether the petitioner proves that the respondent has appealed to the voters to vote in his favour on religious grounds as alleged in the petition? If yes, is it further proved that the respondent is guilty of committing corrupt practice within the meaning of Sec.123 of the Representation of Peoples's Act, 1951?

6. What order?

7. The petitioner has deposed vide Exh.28 to establish the contents of the petition and has examined following witnesses:

1. PW 2 Khumansiunh Dhanvirsinh Gurkh Exh.31.
2. PW 3 Manubhai Shivaji Kalal Exh.31/A.
3. PW 4 Ramesh Sendhabhai Patel Exh.31/B.
4. PW 5 Thakore Pratapji Shakaraji Exh.31/C.
5. PW 6 Udaysing Atmaram Jhala Exh.44.
6. PW 7 Harjivanbhai Ganpatbhai Parmar Exh.46.

7. PW 8 Jayprakash Vishanlal Agrawal Exh.47.
8. PW 9 Tukaram Punaram Patil Exh.48.
9. PW 10 Kanjibhai Kababhai Bharwad Exh.49.
10. PW 11 Arunbhai Damodar Agrawal Exh.51.
11. PW 12 Mohamadhabib Mohamadali Ansari Exh.53.
12. PW 13 Narendra N. Rajput Exh.56.
13. PW 14 Bharwad Sureshbhai Mehrubhai Exh.59.
14. PW 14/A Kalpesh Prahaladji Chauhan Exh.61.

As against that the respondent has deposed vide Exh.66(RW 3) and has examined following witnesses:

1. RW 1 Paresh Pramodchandra Thakkar Exh.64.
2. RW 2 Kanjibhai Shambudas Patel Exh.65.
3. RW 4 Pravinbhai Bhagwandas Patel Exh.73.
4. RW 5 Jairambhai Vashibhai Desai Exh.74.
5. RW 6 Haj Innamul Haque Exh.75.
6. RW 7 Fatesinh Himatsinh Rahevav Exh.82.
7. RW 8 Savajibhai Bhanabhai Kharadi Exh.88.
8. RW 9 D.C. Bharawad Exh.93

Both the parties have produced and proved documentary evidence; which shall be referred to at an appropriate stage.

8. Learned Sr. Advocate Shri M.R. Barot and Shri S.K. Zaveri have made submissions on behalf of the petitioner and the respondent respectively. During the submissions, the petitioner has filed Purshis Exh.115 to declare that the petitioner does not press for the findings of issues nos.3, 4 and 5.

That in consideration of material produced on record, in the context of the rival submissions, my findings to the issues are as under for the reasons stated hereinafter.

F I N D I N G S

Issue no.1 In the affirmative.
Issue no.2 In the negative.
Issue no.3 Not pressed.
Issue no.4 Not pressed.
Issue no.5 Not pressed.
Issue no.6 As per final order.

R E A S O N S

Issue no.1

9. The respondent has contested the maintainability of the petition on the following three counts:

(i) That the petition is not filed in the format prescribed vide Sec.81 and 82 of the Act.

(ii) That the petition does not disclose the "cause of action"; and

(iii) That the petitioner has not given the particulars of the alleged " corrupt practice".

It would be pertinent to note that learned Sr. Advocate Shri S.K. Zaveri appearing for the respondent has fairly stated at the Bar that the respondent does not seriously press the objections (i) and (iii); however, it is contended that the petitioner having not pressed the issues nos.3, 4 and 5, only issue no.2 survives and the material facts on which issue no.2 is framed, do not disclose the cause of action.

That the maintainability of the petition is to be determined on the basis of averments made therein. That the perusal of petition suggests that the format and the averments made in the petition are in consonance to the provisions of Secs.81 and 82 of the Act. Furthermore, the particulars stated in the petition alleging corrupt practice being sufficiently clear; it could not be held that the petition does not disclose the " cause of action" even if the petitioner has not pressed for the relief on the said averments of the facts and particulars. Under the circumstances, issue no.1 is decided accordingly.

Issue no.2

10. So far issue no.2 is concerned, learned Sr. Advocate Shri M.R. Barot appearing for the petitioner has stated at the Bar that petitioner would confine the contest to the extent of improper reception of vote which is void as provided under Sec.100(1)(d)(iii) of the Act.

Shri Barot has referred to averments made in paragraphs 5 to 19 of the petition to contend that the petitioner has enumerated the discrepancy in the serial numbers stated in form no.16 issued by the respective Polling Officer to the agents of the candidate. That the serial number of ballot papers issued to the particular booth do not tally and materially differ with the serial

number stated in column no.3 in respect to ballot papers utilized. On the basis of said fact, Shri Barot has contended that ballot papers which are provided to a particular booth and if the same are not used for polling but ballot papers of different series are used at the said booth acceptance of such used ballot papers during the counting of vote would amount to acceptance of void vote which is contrary to the provisions contained under Sec.100(1)(d)(iii) of the Act.

Shri Barot has further submitted that despite enumerating such discrepancy in paragraph 5 to 19 of the petition, the respondent has merely denied the said fact and no explanation or other contention has been raised. Furthermore, Shri Barot has referred to deposition of the petitioner Exh.28 wherein the petitioner has stated on oath that on the next day of polling, he had made written complaints to the Election Commissioner that all the agents of the petitioner who were present at the booth on the day of polling were not supplied with form no.16 by the Polling Officer. That the said statement had remained uncontroverted. Not only that the petitioner applied for the certified copy of the form no.16 in respect to all the 126 booths established for the polling of said constituency. That though such certified copies are permissible under Rule 93(2) of the Rules, no copies are supplied to the petitioner, and thereby, the petitioner could produce only few copies which were available while filing the petition. Shri Barot has referred to an accompaniment annexed with application Exh.109 wherein difference of vote as apparent from form no.16 for the 13 booths are calculated which comes to 3679 and has urged that if the difference of vote for 13 booths is to the extent of 3679, then if the form no.16 of remaining booths out of total 126 booths are taken into account the difference would be higher and may exceed 8290 - the difference of vote by which the respondent is declared as returned candidate. Shri Barot has further submitted that in order to overcome the difficulty of non supply of certified copies of form no.16 in respect to all the 126 booths, the petitioner had moved application Exh.103 to claim production summons to the returning officer of 69, Dariapur Kazipur, Gujarat State Legislative Assembly Constituency with a direction to produce form no.16 used in the election held on 28-2-1998 alongwith application of the applicant-candidate tendered on 6-3-1998 and 11-3-1998 with copy of reply given dated 7-3-1998. That the Court vide order dated 21-7-2000 has ordered to issue such production summons and pursuant to that one Ramesh A Mirja the returning officer has produced the documents

with list Exh.108. That the said documents are kept in a sealed cover with O.J. Department. That thereafter, the petitioner had moved application Exh.109 with a prayer to issue witness summons to said witness Shri Ramesh A Mirja, the then, Election Officer of 69, Dariapur Kazipur, Gujarat State Legislative Assembly Constituency for the election held on 28-2-1998, however, vide order dated 1-9-2000, this Court has rejected the said application, and as such, the said witness could not be examined to establish the facts apparent from documentary evidence the form no.16 in respect to all the 126 polling booths.

11. It is submitted on behalf of the petitioner that said documents consisting of form no.16 produced on record vide list Exh.108 should be admitted on record on the ground that documents are prepared by public servant in due discharge of his duties, and as such, are in the nature of public documents within the meaning of Secs.74 to 78 of the Evidence Act. To support the submission, Shri Barot has heavily relied on the observations made by the Supreme Court in the matter of BANAMALI DAS VS. RAJENDRA CHANDRA MARDARAJ HARICHANDAN AND ORS., reported vide AIR 1975 SC 1863.

12. It is also submitted on behalf of the petitioner by Sr. Advocate Shri Barot that improper reception or rejection of vote also include mistakes or wrong judgments made by returning officer in exercise of powers conferred by Rule 56(a) to 56(h) of the Rules. To support the said submission, Shri Barot has referred to and relied on the observations made by the Supreme Court in the matter of P. MALAI CHAMI VS. M ANDI AMBALAM AND ORS. reported vide AIR 1973 SC 2077.

13. As against that learned Sr. Advocate Shri S.K. Zaveri appearing for the respondent has urged that submission made on behalf of the petitioner is based on misconception in respect to form no.16. Shri Zaveri has referred to Rule 45 of the Rules and has submitted that format of form no.16 is prescribed so as to maintain the account of ballot papers. That the Presiding Officer is supposed to furnish the true copy of form no.16 to the polling agents of the candidates who were present at the close of the poll. That it is for the petitioner to explain as to why his polling agents did not collect the true copies of the form no.16 from the respective polling officer at the close of poling. Shri Zaveri has vehemently urged that facts deposed by the polling agents

of the petitioner that they were not supplied with the true copies of form no.16 despite demand could not be believed in view of subsequent conduct of the petitioner as well as the polling agents of the petitioner. It is submitted on behalf of the respondent that polling was held on 28-2-1998 while counting was undertaken on 2nd March, 1998. That neither the petitioner nor the polling agents of the petitioner have made any complaint to any authority regarding non supply of form no.16 despite demand made to the polling officer. That the petitioner could have raised the said question before commencement of the counting, however, nowhere in the petition any averments are made that the petitioner had made any complaint in respect to non receipt of true copies of form no.16 at the end of polling nor has made any

complaint at the commencement of counting and scrutiny of ballot papers in respect to alleged discrepancy in the serial numbers of ballot papers as stated in form no.16 on which heavy reliance is placed by the petitioner. It is also submitted that in the absence of pleadings the petitioner could not be permitted to raise any such contention and even if permitted the contention could not be sustained as it is nothing but an after thought raised at a belated stage. Referring to prescribed form no.16 under the Rules, Shri Zaveri has pointed out that the format prescribed under the Rules itself suggests that serial number of ballot papers need not be stated. Thus, it is not obligatory on the part of the polling officer to state the serial number of ballot papers received, used and have remained unused as per the columns nos.1 and 3 of form no.16. It is also submitted on behalf of the respondent that if Rules do not require to state the serial number in a prescribed format of form no.16, it could not be said that the polling officer or the officer in charge has written the serial number of ballot papers in due discharge of his public duty. Under such circumstances, first part of form no.16 cannot be said to be a public document as contended on behalf of the petitioner. Shri Zaveri has referred to and relied on the observations made by the Privy Council in the mater of RAI BHAIYA DIRGAJ DEO BAHADUR VS. BENI MAHTO, reported vide 20 BLR 712 and in the matter of STATE OF BIHAR AND ORS VS. SRI RADHA KRISHNA SINGH AND ORS., reported vide AIR 1983 SC 684 wherein it is stated that

if in a part of the document entry made by public servant, is not required to be made under the law, the document cannot be admissible in evidence as document

would not fall within the purview of Sec.35 of the Evidence Act. On the basis of said observation, Shri Zaveri has further submitted that prayer made on behalf of the petitioner for production of form no.16 of all the 126 booths and to examine a witness to establish the facts stated in the said document has rightly been rejected by the Court as it would be an exercise in futility. It is further submitted by Shri Zaveri that discrepancies even if any as apparent from form no.16 issued by the polling officer at the end of polling in respect to serial number of ballot papers could not make the ballot paper invalid nor would it make the vote void, if any, cast on the said ballot paper, and thereby, particulars enumerated by the petitioner vide paragraphs 5 to 19 of the petition are irrelevant and extraneous to the dispute and could be of no assistance to the petitioner. It is lastly submitted by Shri Zaveri that the petitioner not having raised any dispute regarding alleged discrepancy apparent from form no.16 in respect to serial number of ballot papers which are used for polling prior to or at the time of commencement of counting of vote has acquiesced to the said factum and is now estopped from contending the said fact to challenge the validity of the election. Shri Zaveri has heavily relied on the observation made by the Supreme Court in the matter of OM PRAKASH SHUKLA VS. AKHILESH KUMAR SHUKLA AND ORS., reported vide AIR 1986 SC 1043 and has urged that petitioner having participated in the process of counting and declaration of result, now cannot be permitted to contend that void votes have been accepted which has materially affected the result of the election.

14. That as regards the contention for recounting of votes urged by the petitioner in the petition, it has been submitted on behalf of the respondent that under Rule 93 (1)(a) to 93 (1)(e) of the Rules an embargo is created by the law for inspection or production of original ballot papers so as to maintain secrecy of vote. That according to said rule, an error of high magnitude which could affect the result of election materially is required to be established as a condition precedent to lift the embargo. To support the said submission, Shri Zaveri has referred to and relied on the observations made by the Supreme Court in the matter of M.R.GOPALKRISHNAN vs. THACHADY PRABHAKARAN AND OTHERS, reported vide 1995 (Supp.)2 SCC 101 and has urged that , in the instant case, the petitioner has miserably failed to make out any case, much less, a prima facie case, and

thereby, issue no.2 should be decided against the petitioner.

On appreciation of rival submission, it is difficult to disagree with the submission urged by learned Sr. Advocate Shri S.K. Zaveri on behalf of the respondent.

15. It would be pertinent to note that it is not the case of the petitioner that at the time of polling the ballot papers used by the polling officer were not the ballot papers prepared and printed for the subject election of the said constituency. Nowhere in the petition, the petitioner has alleged any such contention. Thereby, there cannot be any question of acceptance of void votes at the time of counting as urged on behalf of the petitioner.

16. Furthermore, the submission urged on behalf of the petitioner regarding reception of void vote also appears to be misconceived and contrary to the proposition of law. That Sec.62 of the Act prescribes right to vote and any vote cast contrary to Sec.62 could be said to be a void vote which could not be accepted as a valid vote during counting. Furthermore, following votes could also be the instances of void vote under the provisions of the Act.

(i) vote cast by a person whose name is not entered in electoral rolls of the constituency in an election in that constituency; [sec.20(1), Act 1951]

(ii) vote cast by a person who is not a citizen of India:[section 191)(a), Act 1951]

(iii) vote cast by a person who is of unsound mind and stands so declared by a competent Court;[section 1(1)(b),Act 1950]

(iv) vote cast by a person who has been disqualified for voting under commission of a corrupt practice;[section 1(1)(c), Act 1950]

(v) where a person votes having already voted in another constituency;[section 2(3),Act1951]

(vi) where a person votes more than once in the same constituency;[section 62(1), Act 1951]

(vii) vote cast by a person who is confined in a prison or is in lawful custody of the police but not under preventive detention; [section 2(5), Act 1951] and

(viii) a vote which is to be rejected under rules.

17. The submission urged on behalf of the petitioner regarding acceptance of void vote on account of discrepancies apparent in respect to serial number stated in form no.16 collected by some of the polling agents of the candidate could not be merited acceptance on aforesaid discussion.

The petitioner having failed to make out a prima facie case to inspect the ballot papers, the embargo created by Rule 93(1)(a) to 93(1)(e) prohibiting inspection or production of certain documents cannot be lifted to verify the alleged discrepancy of serial number of ballot papers as contended in the petition and submitted at the time of arguments. As a matter of fact it is required to be noted that the petitioner having failed to produce necessary evidence to establish the allegation made in the petition appears to have resorted to an after thought to contend that result of election has been materially affected on account of acceptance of

votes which are void. The petitioner has failed to establish the such contention also, and as such, the

finding of issue no.2 is given accordingly.

18. On the basis of aforesaid discussion and the findings of issues, the following operative orders are passed:

The petition fails and stands disposed of as rejected with costs. The petitioner shall pay the cost to the respondent quantified at Rs.2000/-. That the security deposit made by the petitioner shall be paid to the respondent by way of cost if the amount of cost is not paid within a period of two weeks.

The operative part of the order and authentic copy of the judgment is ordered to be sent to the Election Commissioner and the Speaker of the State Legislature, State of Gujarat as required under Sec.103 of the Act.

(A.K.Trivedi,J)
stanley-akt.